Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of MCI Telecommunications Co., Inc. Petition for Expedited Declaratory Ruling	CC Dkt. No. 97-100

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Opposition of Bell Atlantic and NYNEX

MCI's request that the Commission preempt sections of the Arkansas telecommunications reform law is based upon a fundamental misunderstanding of the Communications Act, in particular of section 253, and it should be denied for that reason alone.[1]

The provisions of section 253 were designed to eliminate state laws and rules that excluded competitors, while at the same time preserving state authority to regulate in the public interest. Section 253(a) overrides certain state and local legal requirements, in general terms, those that prohibit firms from offering services. Under this authority, the Commission has preempted a state commission decision that permitted only certified local exchange carriers to provide payphone services[2] and would allow it to preempt similar sorts of restrictions that have existed in various states.

This authority is not unlimited, however. In subsections 253(b) and (c), Congress provided that section 251 does *not* invalidate such state and local legal requirements if they are

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1 Bell Atlantic and NYNEX express no opinion as to whether the state law runs afoul of section 253 under the competitive circumstances that exist in Arkansas today.

2 *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, CCB Pol 96-11, FCC 96-470 (rel. Apr. 18, 1997).

imposed for one of the purposes specified in those subsections (protecting the public safety and welfare, safeguarding the rights of consumers, preserving universal service, managing rights of way, etc.). The only constraint that Congress placed on this category of legal requirements is that they be "competitively neutral."

MCI misinterprets section 253 in two important ways.

First, as in other sections of the 1996 Act, Congress took care in drafting provisions that would displace state law and regulation. Thus, section 253(a) only prohibits states and localities from adopting a "legal requirement [that] may prohibit or have the effect of prohibiting the ability of any entity" to provide a telecommunications service. If a legal requirement does not have this effect — if it does not "prohibit or have the effect of prohibiting" an entity from providing a service — then it cannot violate section 253.

MCI, however, argues that section 253 is violated by a legal requirement that "significantly deter[s] or burden[s] potential new competitors"[3] or that "disadvantages" new entrants as compared to incumbents.[4] This is simply not what the statute says.

MCI's hook to try to extend the reach of section 253(a) from "prohibitions" to "burdens" presumably is that the title of the section refers to "barriers to entry."[5] However, it is hornbook law that it is the text of the statute, not the section title, that is relevant and has meaning.[6]

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3 MCI Petition at 4.

4 MCI Petition at 5.

5 MCI's reading — that section 253 bars states from doing anything that might constitute a "barrier to entry" from an antitrust perspective — would produce bizarre results. Even the antitrust laws do not make all "barriers to entry" illegal, even if erected by a private party. MCI's interpretation, however, would strike down *anything* that might be a barrier when imposed by public officials for the public good. Congress surely would not have placed greater restrictions on state governments than on competitors.

Second, MCI suggests that section 253 gives the Commission the power to preempt any state rule simply if the Commission concludes that the rule is not competitively neutral.[7] As shown above, section 253 applies *only* to state legal requirements that "prohibit or have the effect of prohibiting the ability of any entity" from providing a service. It does not create a general federal requirement that state regulations be competitively neutral or give the Commission authority to invalidate those state requirements it believes fail this test.

Subsections (b) and (c) of section 253 do, of course, refer to competitive neutrality. However, these subsections come into play *only* in determining whether a state requirement that violates section 253(a) should still be preserved. If a state requirement does not have the exclusionary effect described in subsection (a), then there is no need to look at subsections (b) or (c) or to consider competitive neutrality. If the requirement does have that exclusionary effect, then it can be preserved under subsections (b) and (c) if it was imposed for one of the specified purposes and is competitively neutral.

MCI also misconstrues another section of the 1996 Act, section 252(e)(5). That provision requires the Commission to act if a state commission "fails to act . . . in any proceeding or other matter" under section 252. The Conference Report describes section 252(e) as "provid[ing] a specific timetable for State action, [and] provid[ing] Commission authority to act if a State does

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[6] *Brotherhood of R.R. Trainmen v. Baltimore & O.R.*, 331 U.S. 519, 528-29 (1947); *United States v. Fisher*, 2 U.S. (Cranch) 358, 386 (1805).

[7] MCI Petition at 1 ("Section 253(d) of the 1996 Act gives the Commission the power to preempt any state 'statute, regulation, or legal requirement' . . . that imposes requirements to preserve and advance universal service in a manner that is not competitively neutral").

not. . . ."[8] MCI does not allege that the Arkansas state commission has failed to act in any proceeding. Therefore, MCI may not invoke this provision.

Finally, MCI's petition fails to discuss the provision of the Act that is most relevant to its claims, namely section 251(d)(3), which explicitly preserves state authority over interconnection and related matters. That provision states that the Commission shall not preclude the enforcement of any state regulation, order or policy that is consistent with section 251 and that does not "substantially prevent" implementation of that section. MCI does not even attempt to make the required showing that the Arkansas statute substantially prevents implementation of section 251.

For these reasons, the Commission should dismiss MCI's petition.

Respectfully submitted,

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[8] H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., 126 (1996).

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 1997, a copy of the foregoing "Opposition of Bell Atlantic and NYNEX" was served by first class U.S. mail to the parties on the attached list.

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